Supreme Court, U. S.
FILED
SEP 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,
Petitioner,

v.

FRANCES P. PONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

ROBERT E. WILLIAMS
FRANK C. MORRIS, JR.
McGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

WILSON · EPES PRINTING CO., INC. · RE 7-6002 · WASHINGTON, D. C. 20001

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *Amicus Curiae* of the Equal Employment Advisory Council (EEAC) is submitted pursuant to the written consent of all parties.[1] EEAC is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its

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[1] Their consents have been filed with the Court Clerk.

membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Substantially all of EEAC's members or their constituents, are employers subject to the provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (ADEA or "the Act"). As such EEAC members have a direct interest in the issues presented for the Court's consideration in this case, which concern whether jury trial is available in ADEA actions seeking reinstatement and backpay.

STATEMENT OF THE CASE

Frances Pons initiated this individual action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (hereafter ADEA or "the Act"), alleging that her discharge by Lorillard was motivated by age discrimination. She sought reinstatement and backpay and demanded jury trial.[2] The district court

[2] Plaintiff's complaint also requested liquidated damages, costs and attorney fees. 549 F.2d at 951, 14 FEP Cases at 613. However, Pons had "conceded that the liquidated damages issue would not be triable to a jury" (*id.* at n. 3) and made "no argument that the other issues [would] support trial by jury." 13 FEP Cases at 444. While the case was pending in the court of appeals, plaintiff moved to amend the complaint to include a prayer for punitive damages. 549 F.2d

granted Lorrilard's motion to strike the jury demand as it found ADEA backpay, like backpay under other employment discrimination statutes, was part of the equitable remedy of reinstatement. On appeal, the Fourth Circuit reversed and held that Pons was entitled to jury trial on the backpay issue.

SUMMARY OF ARGUMENT

An analysis of the right to jury trial on the issues of reinstatement and backpay under the ADEA involves two separate inquiries. The first is whether Congress intended to provide jury trial under the ADEA. The second is whether the Seventh Amendment right to jury trial applies to ADEA actions for reinstatement and backpay.

As to the first issue, it is abundantly clear that Congress did not intend to provide jury trial under the ADEA. The statute does not mention jury trial and the legislative history does not support inferring the right in ADEA cases. Further, the carefully drawn Congressional enforcement scheme would be profoundly disturbed by providing jury trial.

The second inquiry, whether the Seventh Amendment requires jury trial of claims for reinstatement and backpay, necessitates application of the three

at 951 n. 2, 14 FEP Cases at 613 n. 2. The court of appeals remanded this motion to the district court to decide in the first instance the availability of such damages under the ADEA. *Id.* at 954 n. 7, at 615 n. 7. *See* n. 30 *infra.* Accordingly, the sole issue before the Fourth Circuit was the right to jury trial on the backpay issue. 549 F.2d at 951 n. 3, 14 FEP Cases at 613 n. 3.

pronged test of *Ross* v. *Bernhard*,[3] which inquires into the 1938 pre-merger equitable-legal dichotomy, whether the remedy sought is legal or equitable and whether a jury is able to comprehend the issue. Application of these tests to the instant case shows that the "nature of the [backpay] issue" is equitable and does not require jury trial. *Id.* For ADEA backpay claims, like backpay claims under Title VII and other employment discrimination statutes, "are, in substance, for restitution."[4] An ADEA "judgment compelling reinstatement and backpay (double if willful) makes an ADEA plaintiff whole, within the contemplation of Congress."[5] Thus, application of the second prong of the *Ross* analysis, with appropriate attention to the categorization of reinstatement and backpay as equitable remedies under other employment statutes, shows that the court below was in error. The correct conclusion was reached by the Sixth Circuit, which stated that payment of wrongfully withheld funds under the ADEA "is an integral part of the basic equitable claim for reinstatement." *Morelock* v. *NCR Corp.*, 546 F.2d 682, 689, 14 FEP Cases 65, 69 (6th Cir. 1976), *reh. denied*, (May 17, 1977), *pet. for cert. pending*, No. 77-172. Accordingly, backpay is an equitable issue and is "not suitable for trial by jury." *Id.*

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[3] 396 U.S. 531, 538 (1970).

[4] *Polstorff* v. *Fletcher*, 430 F. Supp. 592, 595, 14 FEP Cases 1638, 1640 (N.D. Ala. 1977).

[5] *Looney* v. *Commercial Union Assurance Co.*, 428 F. Supp. 533, 537, 14 FEP Cases 843, 846 (E.D. Mich. 1977) and cases there cited.

ARGUMENT

I. The Language of the ADEA and Its Legislative History Indicate That Congress Did Not Intend To Afford Jury Trial In ADEA Lawsuits.

The first step in determining whether jury trial is available in an ADEA action for reinstatement and backpay is to determine whether Congress intended such actions to be tried to juries. This requires examination of both the statutory language and the legislative history. Examination of the statutory language is simple and conclusive, as there is no provision authorizing jury trial in ADEA actions. *Hannon* v. *Continental National Bank*, 427 F. Supp. 215, 218, 14 FEP Cases 1364, 1367 (D. Col. 1977). The absence of any such express provision is consistent with the legislative history which fails to disclose any substantial support for providing jury trial under the ADEA. *Id.* The authoritative House and Senate Committee reports closely analyze the enforcement provisions of the proposed bills and nowhere so much as suggest an intent to provide jury trial. S. Rep. No. 723, 90th Cong. 1st Sess. 5-6, 9-10; H. Rep. No. 805, 90th Cong. 1st Sess., 1967 U.S. Code Cong. and Admin. News 2213, 2218, 2222-2223.[6]

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[6] In a Senate colloquy concerning whether the ADEA bill would prohibit discrimination on the basis of age between two individuals covered by the Act (e.g. 47 and 57), Senator Javits stated that the issue would be whether the sole criterion for selection between two such individuals was age and that a "jury will answer yes or no." 113 Cong. Rec. 31255 (1967). This isolated and off-hand reference, during consideration of a wholly separate issue, does not provide the predicate for reasonably contending that Congress intended to afford jury trial in ADEA actions. Rather, the absence of express statutory sanction, and of any direct discussion in the legislative

Conversely, when Congress does intend to provide jury trial in an employment discrimination statute, it does so in express and unmistakable language. Thus, although Congress has not provided for jury trial in actions alleging discrimination under Title VII (42 U.S.C. § 2000(e) *et seq.*),[7] it did provide expressly for jury trial in cases alleging criminal contempt under that Title (42 U.S.C. § 2000(h)):

> In any proceeding for criminal contempt arising under title * * * VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. . . .

Similarly, in legislation authorizing civil litigation in many other contexts, Congress has provided specifically for jury trial where it desired to afford that right. For example, jury trial is provided in actions by seamen for injury or death under the Jones Act (46 U.S.C. § 688), in civil actions against the United States to recover taxes (28 U.S.C. § 2402), and in suits against federal trustees, receivers or managers (28 U.S.C. § 959(a)).[8] Thus, the absence of a provision expressly authorizing jury trial in ADEA actions is highly significant.

The Congressional decision not to provide authorization for jury trial in ADEA lawsuits is in keeping

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history, including the authoritative committee reports, indicate a conscious Congressional choice that jury trial was not to be provided. *Compare* 42 U.S.C. § 2000(h) affording jury trial for alleged criminal contempt under Title VII. See text *infra*.

[7] *See* discussion and cases *infra*, pp. 15-18.

[8] *See* generally 5 Moore's Federal Practice ¶ 38.12.

with the carefully designed remedial structure of the ADEA.[9] This Congressional design provides, as a condition precedent to any ADEA lawsuit, that the prompt non-legal methods of conciliation, conference and mediation provided in Section 7 must be given an unimpeded opportunity to resolve an age discrimination complaint. The Secretary of Labor was given the responsibility to effectuate these non-legal methods so that more time consuming legal remedies would be used infrequently as a last resort:

> It is intended that the responsibility for enforcement vested in the Secretary by section 7, be *initially and exhaustively* directed through informal methods of conciliation, conference, and persuasion and *formal methods applied only in the ultimate sense.* (emphasis added).
>
> H.R. No. 805, 90th Cong., 1st Sess., U.S. Cong. & Adm. News 2213, 2218 (1967).

Brennan v. *Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974). The Congressional scheme established the conciliation-mediation process as the "most favored method of enforcement" of the ADEA and made "private lawsuits . . . secondary to administrative remedies and suits by the Secretary of Labor." *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 941 n. 11, 14 FEP Cases 518, 523, n. 11 (3d Cir. 1977), *pet. for cert. pending*, No. 76-1451.[10]

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[9] *See* 113 Cong. Rec. 34749 (1967) (Cong. Halpern), and n. 22, *infra*.

[10] *Accord*, S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967); *Burgett* v. *Cudahy Co.*, 361 F. Supp. 617, 621 (D. Kan. 1973); *Brennan* v. *Ace Hardware*, *supra*, 495 F.2d at 374, 7 FEP Cases at 661-662. *See* Agatstein, "The Age Discrimination in Employment Act of 1967: A Critique," 19 N.Y.L.F. 309, 319 (1973); 113 Cong. Rec. 34745 (1967) (Cong. Reid).

The timely notice required by Section 7(d)(1)[11] prior to a private suit under the ADEA invokes the Secretary's "exhaustive" efforts to settle the dispute through the preferred "concillatory and mediative action to avert litigation"[12]—"when disputes are fresh," and more easily settled.[13]

The Congressional preference for prompt conciliation, like the Congressional rejection of ADEA en-

[11] Section 7(d) (29 U.S.C. 626(d)) expressly provides:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary [of Labor] not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . .

Under the statute, the giving of such notice then invokes a corresponding duty upon the Secretary of Labor:

> . . . upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

[12] *McCrickard* v. *Acme Visible Records, Inc.*, 409 F. Supp. 341, 343, 344, 13 FEP Cases, 822, 823, 824 (W.D. Va. 1976).

[13] *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 94, 11 FEP Cases 828, 830 (8th Cir. 1975). *Accord*, *Platt* v. *Burroughs Corp.*, 424 F. Supp. 1329, 1334-35, 14 FEP Cases 1057, 1060 (E.D. Pa. 1976); *McCrickard* v. *Acme Visible Records*, *supra*, 409 F. Supp. at 343, 13 FEP Cases 823.

Disputes are easier to settle initially because the parties' positions have not hardened and the backpay involved is not likely to be great. This is important as the ADEA covers employers with but 20 or more employees, and such small employers may be forced to litigate claims grown large through the passage of time.

forcement by the already over-burdened Equal Employment Opportunity Commission, was premised on the desire that age complaints be expeditiously resolved.[14] Prompt resolution of such disputes was deemed essential, as discharged older Americans and their families may face critical problems without a regular paycheck and livelihood. Congress was well aware of the burden on Title VII discriminatees because of the dilatory pace of EEOC proceedings and crowded court dockets.[15] As shown by the primacy it gave to the conciliation process, Congress did not wish to add the attendant delays of jury trial to the problems facing age discriminatees.[16]

In sum, there is neither express statutory authorization, nor any probative legislative history to indicate a Congressional desire to provide jury trial in ADEA actions. To the contrary, jury trial would be inconsistent with the Congressional concern for prompt resolution of age complaints which is evident throughout the ADEA's carefully designed remedial scheme and the legislative history of the Act.

[14] *See* 113 Cong. Rec. 31254 (1967) (Sen. Javits); Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. 141-43, 412-14 (1967); Note, Age Discrimination Act of 1967, 90 Harv. L. Rev. 380, 381 (1976); *Rogers* v. *Exxon*, *supra*, 550 F.2d at 841, 14 FEP Cases at 523.

[15] *See Rogers* v. *Exxon*, *supra*, 550 F.2d at 841, 14 FEP Cases at 524. ("Congress did not desire . . . to substantially increase the volume of litigation in the trial courts . . .").

[16] *See* Note, "*Ross* v. *Bernhard*: The Uncertain Future of the Seventh Amendment," 81 Yale L. J. 112, 123-26 (1971).

II. The Seventh Amendment Is Not Applicable To an ADEA Action For Reinstatement and Backpay.

A. *Introduction—The Controlling Principles.*

Absent Congressional intent to provide jury trials under the ADEA, the right must derive, if at all, from the Seventh Amendment, which provides that "[i]n suits at common law . . . the right of trial by jury shall be preserved." The Seventh Amendment right to jury trial arises only if a statute "creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). Thus, the existence of the right is determined by reference to the English common law of 1791, the effective date of the amendment. *E.g., Dimick* v. *Schiedt*, 293 U.S. 474, 476 (1935); *Baltimore and Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935).[17] To be sure, the right plainly extends "beyond the common law forms of action recognized" in 1791 [18] to subsequent statutes creating new causes of action, but only if "the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty." *Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974).

The Seventh Amendment inquiry, therefore, turns on the "nature of the issue to be tried rather than the character of the overall action." *Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970). In *Ross*, this Court established a three-pronged test for determining

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[17] *Accord, Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 377 (1913).

[18] *Curtis* v. *Loether, supra*, 415 U.S. at 193.

whether an issue is "legal" within the meaning of the Seventh Amendment. A court must determine (1) whether a claim was legal or equitable before the 1938 merger of law and equity in the Federal Rules of Civil Procedure; (2) whether the remedy sought is legal or equitable; and (3) whether the issue is triable to a jury given the jurors' practical abilities and limitations. *Id.* Application of these principles yields the conclusion that there is no Constitutional right to jury trial in an action for reinstatement and backpay under the ADEA.

B. *The Equitable Nature of Reinstatement and Accompanying Backpay Under the ADEA.*

The Congressional purpose in enacting the ADEA was to establish federal statutory protection against an additional kind of employment discrimination, parallel to and consonant with the protections against discrimination already embodied in Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* The legislative history of the ADEA is replete with comparisons to these existing laws dealing with employment discrimination based on race, religion, national origin, sex and union activities. *See, e.g.*, 113 Cong. Rec. 34742 (90th Cong., 1st Sess.) (remarks of Rep. Steiger and Rep. Matsunaga); *id.* at 34774 (remarks of Rep. Kelly). Representative Burke underscored this parallel Congressional intent (113 Cong. Rec. 34742):

> In the last several years, significant legislation to bar employment discrimination on the basis of race, religion, color, and sex has been enacted. It is only just that we do the same against discrimination on the basis of age.

The courts have recognized this parallelism. As the Fifth Circuit stated in *Hodgson* v. *First Federal Savings & Loan Ass'n*, 455 F. 2d 818, 820, 4 FEP Cases 269, 270 (5th Cir. 1972):

> With a few minor exceptions the prohibitions of this enactment [the Age Act] are in terms identical to those of Title VII of the Civil Rights Act of 1964, except that 'age' has been substituted for 'race, color, religion, sex, or national origin.'

Accord, Morelock v. *NCR Corp.*, 546 F.2d 682, 686-87, 14 FEP Cases 65, 67 (6th Cir. 1976), *reh. denied*, (May 17, 1977); *Goger* v. *H. K. Porter Co.*, 492 F.2d 13, 15, 7 FEP Cases 71, 72 (3d Cir. 1974).[19]

Although the ADEA incorporates certain of the enforcement provisions of the Fair Labor Standards Act, its remedies for employment discrimination, like those of the other statutes mentioned, center on the equitable relief of injunctions compelling reinstatement or hiring and backpay to restore discriminatees fully to their prior status. ADEA Section 7.[20] *See*

[19] *See also Polstorff* v. *Fletcher*, 430 F. Supp. 592, 594, 14 FEP Cases 1638, 1639 (N.D. Ala. 1977):

> The purposes of Title VII and the ADEA, the discouragement of discrimination in employment, are substantially similar. The prohibitions of Title VII, contained in 42 U.S.C. § 2000e-3(a), and those of the ADEA are identical except that the former prohibits discrimination based on race, color, religion, sex, and national origin, while the latter prohibits discrimination based on age.

Accord, O'Connell v. *Ford Motor Co.*, 11 FEP Cases 1471, 1472 (E.D. Mich. 1975).

[20] Section 7 provides in pertinent part:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, that liquidated damages shall be payable only in case of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.
>
> (c) Any aggrieved individual may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any individual to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such individual under this Act.

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975).

The court of appeals focused exclusively on the general "legal relief" language of Section 7 and the monetary nature of backpay.[21] It ignored the Act's

[21] As discussed below, p. 20, this Court has forcefully stated that not every "award of monetary relief must necessarily be 'legal' relief" for purposes of the Seventh Amendment.

equally explicit "equitable relief" mandate and the specifically enumerated remedies of employment injunctions and backpay for violations of the Act.[22] Nor did it consider the nature of specific remedies sought herein—reinstatement and backpay—as required by *Ross*. *See* 549 F.2d at 952-53, 14 FEP Cases at 614. *Compare Looney* v. *Commercial Union*, *supra*, 428 F. Supp. at 535 n. 4, 14 FEP Cases at 845 n. 4. Because the lower court relied on the "legal relief" language, it found inapplicable precedents under other employment discrimination statutes lacking such language, and relied instead on Title VIII of the 1968

Curtis v. *Loether*, *supra*, 415 U.S. at 196. *See also* cases cited *infra* n. 33.

Chilton v. *National Cash Register*, 370 F. Supp. 660, 7 FEP Cases 203 (S.D. Ohio 1974) is the first and leading case finding jury trial available on backpay claims. However, that decision issued before this Court's *Curtis* decision, and *Chilton's* reliance on the monetary feature of backpay is accordingly suspect. *See also Morelock* v. *NCR*, *supra*, 546 F.2d at 689 n. 17, 14 FEP Cases at 69 n. 17, wherein the Sixth Circuit criticized *Chilton* for relying on Title VIII rather than Title VII precedents. *See* discussion *infra*, pp. 18-19, and *Sant* v. *Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976).

[22] *See Looney* v. *Commercial Union Assurance Cos.*, 429 F. Supp. 533, 537, 14 FEP Cases 843, 846 (E.D. Mich. 1977), which notes that all of the forms of relief specifically enumerated in the ADEA are equitable. This conclusion is supported by the ADEA legislative history, which indicates that Congress viewed backpay as equitable rather than legal relief. Thus, after discussing the structure of the ADEA, which had been "carefully drawn," Congressman Halpern noted that its remedies provided for employment injunctions and "equitable wage payments." 113 Cong. Rec. 34749 (1967). Notwithstanding the "legal relief" relief language of the ADEA, Congress plainly intended to provide the "equitable relief" of backpay under that Act, just as it had under Title VII.

Civil Rights Act (42 U.S.C. 3601 *et seq.*), which prohibits discrimination in housing, and on the fact that "unpaid minimum wages" under the FLSA are considered to be a legal damage claim in private lawsuits. *Id.*[23]

Had the court below properly applied the *Ross* analyses, it would have begun to consider "the nature of the [backpay] issue" (*Ross*, *supra*) by determining how the interrelated issues of reinstatement and backpay are treated under Title VII and other federal *employment* discrimination statutes. And it must be regarded as significant that under other federal employment discrimination statutes, these remedies repeatedly have been held to be equitable issues falling outside the "legal" boundaries of the Seventh Amendment. The following cases are illustrative of the well settled law finding backpay to be an integral element of the equitable remedy of restitution under statutes analogous to the ADEA:

> NLRA—*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47-49 (1937).
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> Title VII—*E.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802, 3 FEP Cases 653, 661 (4th Cir.), *cert. dismissed under Rule 60*, 404 U.S. 1006 (1971); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125, 2 FEP Cases 231, 233 (5th Cir. 1969); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 308, 10 FEP Cases 239, 243 (6th Cir. 1975); *Slack* v. *Havens*, 522 F.2d 1091, 1094, 11 FEP Cases 27, 29-30 (9th Cir. 1975); *Loo* v. *Gerarge*, 374 F. Supp. 1338 (D. Ha. 1974). *See also Curtis*, *supra*, 415 U.S. at 196-97.

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[23] *See McClanahan* v. *Mathews*, 440 F.2d 320, 19 WH Cases 1051 (6th Cir. 1971).

42 U.S.C. § 1981—*E.g.*, *Smith* v. *Hampton Training School*, 360 F.2d 577, 9 FEP Cases 1092, 1094 n. 8 (4th Cir. 1966) (*en banc*); *Lynch* v. *Pan American Airways*, 475 F.2d 764 (5th Cir. 1973); *EEOC* v. *Detroit Edison*, *supra*, 515 F.2d at 309, 10 FEP Cases at 244, *Flores* v. *Local 25*, IBEW, 407 F. Supp. 218, 12 FEP Cases 185 (E.D.N.Y. 1976).

42 U.S.C. § 1983—*E.g.*, *Smith* v. *Hampton*, *supra*; *Harkless* v. *Sweeney Independent School Dist.*, 427 F.2d 319, 324, 2 FEP Cases 926, 930 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *McFerren* v. *County Bd. of Educ.*, 455 F.2d 199 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972).

The rationale underlying all of these holdings is that hiring and reinstatement orders are essentially equitable remedies residing in the court's discretion, and backpay is an integral part of this equitable relief.[24]

The courts that have engaged in the required *Ross* analysis have reached the same conclusion under the ADEA. *E.g.*, *Morelock* v. *NCR*, *supra*, 546 F.2d at 689, 14 FEP Cases at 68. As the court stated in *Hannon* v. *Continental Bank*, "the purpose of an award of backpay under the ADEA is principally restitutionary."[25]

That conclusion is apt, as backpay under the ADEA, like that under Title VII, "is intended to re-

[24] The Department of Justice successfully urged the same position in *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. 592, 14 FEP Cases 1638, an ADEA suit against the Administrator of the National Aeronautics and Space Administration.

[25] 427 F. Supp. at 220, 14 FEP Cases at 1368. *Accord*, *Looney* v. *Commercial Union Assurance Cos.*, *supra*, 428 F. Supp. at 537-38, 14 FEP Cases at 847.

store the recipients to their rightful economic status absent the effects of the unlawful discrimination." *Robinson* v. *Lorillard*, *supra*, 444 F.2d at 802. The monetary relief—backpay—sought by ADEA complainants "is the equivalent of funds wrongfully withheld from them by [an employer] in the past." *Morelock*, *supra*, 546 F.2d at 689, 14 FEP Cases at 69.[26] A court order providing an employment injunction and backpay to an ADEA complainant serves to restore the pre-discrimination status quo by placing the complainant in the job position and economic condition that would have existed but for the unlawful discrimination.[27] *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 595, 14 FEP Cases at 1640. "[A] judgment compelling reinstatement and backpay (double if willful) makes an ADEA plaintiff whole, within the contemplation of Congress." *Looney* v. *Commercial Union*, *supra*, 528 F.Supp. at 537, 14 FEP Cases at 846. *See* n. 26 *supra*. As payment of wrongfully

[26] In a very real sense in ADEA cases, as in Title VII cases, a backpay award forces a "defendant to disgorge funds wrongfully withheld from the plaintiff." *Curtis* v. *Loether*, *supra*, 415 U.S. at 197. Without such restitution a successful ADEA complainant "would unjustly suffer a loss of earnings." *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 595, 14 FEP Cases at 1640.

[27] It is beyond cavil that discrimination of the sort proscribed by the ADEA and Title VII was not unlawful under the common law. Moreover, it is equally settled that injunctions compelling reinstatement or hiring under employment discrimination statutes are an equitable remedy unknown at common law and are, therefore, outside of the jury trial requirement. *See* cases cited, *supra* pp. 15-16, and *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 594-95, 14 FEP Cases at 1640.

withheld funds under the ADEA "is an integral part of the basic equitable claim for reinstatement . . . the issues to be tried in this case are equitable in nature . . . and not suitable for trial by jury." *Morelock*, 546 F.2d at 689, 14 FEP Cases at 69.[28]

This conclusion is not disturbed by the fact that jury trial is available in Title VIII cases and in private FLSA actions. The court of appeals' reliance on Title VIII and cases thereunder (and rejection of Title VII cases) is misplaced. Unlike the ADEA and Title VII, Title VIII is not an employment discrimination statute. Rather that title prohibits housing discrimination.[29] Consequently, relief under Title VIII does not include equitable reinstatement and backpay, and the required *Ross* analysis of the nature of these particular issues is not advanced by reliance on Title VIII cases. Moreover, Title VIII actions are at law and tried to juries because that statute expressly provides historically "legal" relief —"actual damages and not more than $1,000 punitive damages" (42 U.S.C. § 3612)—in contrast to the equitable remedies enumerated in the ADEA and at

[28] *Accord, Hannon* v. *Continental National Bank, supra*, 427 F. Supp. at 220, 14 FEP Cases at 1368; *Looney* v. *Commercial Union, supra*, 428 F. Supp. at 537, 14 FEP Cases at 847; *Polstorff* v. *Fletcher, supra*, 430 F. Supp. at 594-95, 14 FEP Cases at 1640. ("It is untenable that an action for reinstatement and lost earnings on account of unlawful discrimination should be equitable under Title VII, but legal under the ADEA").

[29] *See* 42 U.S.C. 3601 *et seq.*

issue here.[30] Accordingly, the district court was correct in eschewing reliance on Title VIII and relying instead on Title VII and employment discrimination cases construing the nature of reinstatement and backpay remedies. *See* 69 F.R.D. at 577-79, 13 FEP Cases at 445-47. *Accord, Hannon* v. *Continental Bank, supra*, 427 F. Supp. at 219-20, 14 FEP Cases at 1368; *Platt* v. *Burroughs, supra*, 424 F. Supp. at 1336-37.

The court of appeals' further contention that jury trial is available on the issue of ADEA backpay be-

[30] Also wide of the mark is any argument that jury trial is required in this case because the ADEA's general remedial language includes the phrase "such legal . . . relief as may be appropriate to effectuate the purposes" of the ADEA, which several courts have thought to encompass compensatory or punitive damages. *See e.g. Rogers* v. *Exxon Research & Engineering Co.*, 404 F. Supp. 324 (D. N.J. 1976), *rev'd and remanded*, 550 F.2d 834, 14 FEP Cases 518 (3d Cir. 1977). Such damages were not before the court below (*see* n. 2 *supra*), and are irrelevant to the required *Ross* analysis of the particular issues presented—the categorization of reinstatement and backpay. *See Looney* v. *Commercial Union, supra*, 428 F. Supp. at 535 n. 4, 14 FEP Cases at 845 n. 4. In any event, the better and majority view, as expressed in the Third Circuit's opinion in *Rogers*, is that Congress did not provide for either compensatory or punitive damages under the ADEA. *Rogers, supra*, 550 F.2d at 839-42. *Accord, Platt* v. *Burroughs, supra*, 424 F. Supp. at 1335-38, 14 FEP Cases at 1061-1063; *Fellows* v. *Medford Corp.*, 431 F. Supp. 199, 14 FEP Cases 1156 (D. Ore. 1977); *Looney* v. *Commercial Union, supra*, 428 F. Supp. at 535-37, 14 FEP Cases at 845-846; *Hannon* v. *Continental Bank, supra*, 427 F. Supp. at 217-18, 14 FEP Cases at 1365-66; *Sant* v. *Mack Trucks, Inc.*, 424 F. Supp. 621, 13 FEP Cases 854 (N.D. Cal. 1976). Accordingly, such legal damages are unavailable under the ADEA and cannot, in any event, provide the predicate for jury trial of ADEA actions for equitable reinstatement and backpay.

cause it is available in private FLSA actions for unpaid minimum wages[31] and because the ADEA incorporates certain enforcement procedures of the FLSA, is also without merit. *See* Section 7(b) *supra*, n. 20. As the *Hannon* court observed, actions under § 16(b) of the FLSA (29 U.S.C. § 216 (b)) are for damages alone and are tried to a jury whereas actions by the Secretary under § 17 (29 U.S.C. § 217) are for injunctions to restrain further unlawful wage underpayments as well to compel payment of improperly withheld monies and are tried to the court.[32] The *Hannon* court thus found ADEA actions seeking reinstatement and backpay directly analogous to actions under § 17. 427 F.Supp. at 221, 14 FEP Cases at 1369. *Accord*, *Morelock*, *supra*, 546 F.2d at 687-89, 14 FEP Cases at 68-69.

This conclusion is supported by the important observation of this Court in *Curtis* that it is wrong to assume that "any award of monetary relief must necessarily be 'legal' relief" for purposes of the Seventh Amendment. 415 U.S. at 196.[33] Although, ADEA backpay actions do seek monetary relief, they are unlike FLSA actions which merely resemble rou-

[31] *Wirtz* v. *Jones*, 340 F.2d 901, 904, 16 WH 771 (5th Cir. 1965). *McClanahan* v. *Mathews*, *supra*.

[32] As to the absence of jury trial in § 17 FLSA actions, *see e.g.*, *Sullivan* v. *Wirtz*, 359 F.2d 426, 17 WH 284 (5th Cir.), *cert. denied*, 385 U.S. 852 (1966); *Wirtz* v. *Jones*, *supra*, and cases cited in *Hannon*, 427 F. Supp. at 221, 14 FEP Cases at 1369.

[33] *Accord*, *Morelock*, *supra*, 546 F.2d at 685, 14 FEP Cases at 66; *Slack* v. *Havens*, 522 F.2d 1091, 1094, 11 FEP Cases 27, 29 (9th Cir. 1975); *Hannon*, 427 F. Supp. at 220, 14 FEP Cases at 1368.

tine common law actions for collection of a debt. *Hannon*, *supra*, 427 F.Supp. at 221, 14 FEP Cases at 1369. Rather, as shown, ADEA actions for reinstatement and backpay seek to "disgorge funds wrongfully withheld."[34] Moreover, such ADEA actions invoke "the broad powers of the Court and [are] essentially equitable in nature" and subject to the court's discretion. *Morelock*, *supra*, 546 F.2d at 689, 14 FEP Cases at 69. See § 7(b)(c) *supra*, n. 20. Thus, the unfettered equitable discretion vested in the court by Congress in Section 7 "to determine the appropriate remedies in each case for effectuating the purposes of the ADEA also makes jury trial inappropriate." *Hannon*, 427 F. Supp. at 221, 14 FEP Cases at 1369. *Accord*, *Morelock*, *loc. cit.* Any other conclusion would be anomalous, as backpay under other employment discrimination statutes such as Title VII has been held to be equitable (see cases *supra* pp. 15-16), after application of the *Ross* test, and it is untenable that the constitutional nature of this remedy can change from statute to statute. See *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 594, 14 FEP Cases at 1640; *Hannon*, *supra*, 427 F. Supp. at 220, 14 FEP Cases at 1368; *Morelock*, 546 F.2d at 689, 14 FEP Cases at 69.

[34] *See supra*, pp. 16-18.

CONCLUSION

For the foregoing reasons, the *Amicus Curiae* submits that the district court correctly concluded that jury trial is not available in ADEA actions seeking reinstatement and backpay, and therefore requests that the judgment of the court of appeals be reversed with directions to reinstate the order of the district court granting the motion to strike.

Respectfully submitted,

ROBERT E. WILIAMS
FRANK C. MORRIS, JR.
McGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

September, 1977